

1                   UNITED STATES DISTRICT COURT  
2                   SOUTHERN DISTRICT OF TEXAS  
3                   GALVESTON DIVISION

4                   G&H DIVERSIFIED                   §     3:20-CV-00376  
5                   MANUFACTURING, LP               §  
6                   §  
7                   V.                                  §     9:49 A.M. TO 10:07 A.M.  
8                   §  
9                   §  
10                  DYNAENERGETICS EUROPE           §  
11                  GMBH, ET AL                        §     MARCH 11, 2021  
12

13                  INITIAL CONFERENCE VIA VIDEO CONFERENCE  
14                  BEFORE THE HONORABLE ANDREW M. EDISON  
15                  Volume 1 of 1 Volume

16                  APPEARANCES: (All parties appeared via video conference)

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1       **APPEARANCES:**   **(continued)**

2       Court Reporter:  
3       Laura Wells, RPR, RMR, CRR  
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5       Houston, Texas 77002

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Proceedings recorded by mechanical stenography.  
Transcript produced by computer-assisted transcription.

1                     **(The following proceedings held via video conference.)**

2                     THE COURT: And last but not least, and  
3 definitely not least, Case Number 3:20-CR-376, G&H  
4 Diversified Manufacturing, LLP v. DynaEnergetics Europe.

09:49:48       5 Who do we have, starting with the plaintiff, please?

6                     MR. ALAVI: Good morning, Your Honor. This is  
7 Amir Alavi with AZA for the plaintiff. I have with me, on  
8 Zoom, Steven Jugle from the firm as well.

9                     MR. JUGLE: Good morning, Your Honor.

09:49:52       10 THE COURT: Good morning to both of you.

11                     And for the defendants?

12                     MR. KERNELL: Good morning, Your Honor. This is  
13 Terry Kornell. With me on the hearing and throughout the  
14 hearing this morning is Preston Heard, Barry Herman, and  
09:50:13       15 Stephanie Nguyen. We are acting as local counsel. They  
16 are, respectively, in Atlanta and in Maryland with the  
17 firm of Womble, Bond & Dickinson. And if everything goes  
18 according to plan, I have now said everything that I will  
19 be saying during the hearing.

09:50:45       20 THE COURT: You did a great job, Mr. Kornell.  
21 Good to see you. It's been a long time.

22                     MR. KERNELL: It has. It has. I see we go to  
23 the same hair colorist.

24                     THE COURT: I didn't realize you were as young as  
09:50:48       25 I am. Apparently you didn't read the tie memo, but I'm

1 glad to see everyone else did.

2 MR. KERNELL: Well, I did but -- anyway, go  
3 ahead.

4 THE COURT: Okay. Obviously, a patent  
09:51:03 5 infringement case. Let me start with the unopposed motion  
6 for extension of time to support -- basically, a week  
7 extension, Docket Entry 29. I'll sign that order today or  
8 right now. I was just looking at the docket sheet to see  
9 if Judge Brown beat me to the punch. So we'll get that  
09:51:25 10 signed, and you'll be well on the way there.

11 So, I guess, here is my question. I have the two  
12 drafts y'all sent to me from each side. I'll just be  
13 honest. I'm not sure what I should do with it. Like,  
14 every other time I have been involved in patent cases, the  
09:51:48 15 parties get together and agree to the dates. And so --  
16 I'm just being as candid as I can -- you know, when  
17 someone says, hey, you know, set this deadline 15 weeks  
18 after and someone sends it and says do it and put 11 weeks  
19 after, how do I make a decision? Do I just split the  
09:52:05 20 difference? I mean, what do I do? Because I want to put  
21 together a schedule that the parties want to agree to. It  
22 just sounds -- I mean, I'm just -- I am at a loss.

23 MR. ALAVI: Your Honor, this is Amir Alavi on  
24 behalf of the plaintiff. Maybe I can clarify it just a  
09:52:20 25 little bit. The difference between the two parties'

1 orders, there is really a substantive difference and then  
2 just a form difference.

3 The substantive difference is the plaintiff -- and, by  
4 the way, we're a declaratory judgment action plaintiff.  
09:52:38 5 So the defendants are patent owners. They have now filed  
6 their counterclaims and added parties of patent  
7 infringement.

8 Our position as the -- I guess the defendant in the  
9 counterclaim is that factual discovery should be stayed  
09:52:53 10 until the *Markman* hearing. And, you know, Judge Eskridge  
11 did that in a recent patent case. The theory behind it is  
12 that these cases can get very expensive very quickly on  
13 discovery. The *Markman* order, as you know, is the  
14 critical order that helps the parties understand the scope  
09:53:14 15 of the patent which can either keep the case expansive or  
16 limit it.

17 So if you look at all the proposed dates, that's the  
18 difference, substantively, between the parties. We have  
19 asked for a stay of discovery. And so, we have added,  
09:53:30 20 essentially, eight weeks to all the deadlines after the  
21 *Markman*. So if the Court is not going to stay discovery,  
22 you can simply enter the defendants' proposed scheduling  
23 order because we don't object to that, other than the  
24 concept of the stay of discovery.

09:53:44 25 If you are going to stay discovery, we had proposed

1 adding eight weeks. You may say that's too much time.  
2 You may say that's too little time.

3 The other difference -- and I apologize for this -- on  
4 our side. So if you look at the defendants' proposal,  
5 they give you actual dates after the *Markman* order. So if  
6 you look at their column, they track the -- this Court  
7 scheduling order and they actually fill in the dates.

8 We don't fill in the dates. And the only reason we  
9 did that was to have a discussion with the Court about  
09:53:59 10 whether you want us to after the *Markman* order. The  
11 scheduling order calls for the *Markman* order to be issued  
12 six weeks after the hearing. Sometimes that happens.  
13 Sometimes it doesn't.

14 And so, we're comfortable with a floating set of dates  
09:54:29 15 after the *Markman*, which gives us a little bit of  
16 flexibility so we don't have to come back and ask the  
17 Court to change any of the dates.

18 If the Court doesn't prefer that and you say, "No. I  
19 want the dates in there I have told you in your scheduling  
09:54:41 20 order. If I issue my *Markman* a little bit later, you can  
21 come and ask for deviations," we are also happy to enter  
22 the dates.

23 So those are, I think, the two big differences. One  
24 is substance and one is the form that we didn't fill in  
09:54:55 25 the dates because we wanted to talk to you about having

1 potentially floating dates for the post-*Markman*.

2 THE COURT: Understood. And let me say this. On  
3 the dates issue, you know, at least right now, Judge Brown  
4 is going to handle. He might refer to me, as he has done  
5 before, the *Markman* hearing. But you know -- although I  
6 do like the idea of telling him he has got to issue a  
7 ruling within a certain amount of time, I'm not sure  
8 that -- you know, it's one thing if I was handling it, I  
9 could tell you I would be done by a certain date.

09:55:10 10 Let me ask, I guess Mr. Herman, what is your view on  
11 the discovery stay issue?

12 MR. HERMAN: Thank you, Your Honor. First of  
13 all, I have been in Houston federal court several times,  
14 never in Galveston. What a beautiful courthouse from the  
09:55:37 15 photographs, and I think you would be a very entertaining  
16 and informative and a great judge; but you are not the  
17 right judge for this case because this case should be  
18 going forward in front of Judge Albright in the Western  
19 District of Texas.

09:55:54 20 THE COURT: I totally understand. You know, let  
21 me say this.

22 MR. HERMAN: And in all honesty -- yes. Go  
23 ahead.

24 THE COURT: Your point is well taken. And,  
09:56:02 25 obviously, that motion has got to be decided. I mean, let

1 me say this: That motion, if the motion is granted, Judge  
2 Albright will handle it; and we'll never hear -- we will  
3 never hear from this again. If it's denied, then we go  
4 forward here.

09:56:15 5 I simply want to make sure I put a schedule in place.  
6 Which it is sort of our standard practice that I have got  
7 a schedule in place to cover all this.

09:56:29 8 MR. HERMAN: That is fine, Your Honor. And I  
9 think litigants use the word "irony" too often; but it's  
10 incredibly ironic that Mr. Alavi, who is a very  
11 sophisticated patent lawyer, is suggesting that you adopt  
12 Judge Albright's practice, since Judge Albright in Waco is  
13 bifurcating, if you will. He has no real discovery,  
14 except for jurisdictional discovery, until the *Markman*  
09:56:48 15 hearing. But that's not the standard in the Southern  
16 District of Texas under any circumstance.

17 And so if this case is going to go forward in front of  
18 you or Judge Brown, we don't see any reason to deviate  
19 from the normal discovery procedures, which is a  
09:57:03 20 full-blown discovery. If the case is going to go forward  
21 in front of Judge Albright, then Mr. Alavi will have the  
22 schedule, basically, that he is suggesting you adopt.

23 So from our perspective, Your Honor, we don't know --  
24 if you want to enter a schedule, obviously, that's your  
09:57:21 25 prerogative. We would suggest that you just wait until

1 after the briefing, after the hearing, or however the  
2 motion to dismiss is going to be decided, and then enter a  
3 schedule there as the case goes forward. I don't know --

4 THE COURT: Let's say we did that. Let's say we  
5 did that. And then, if I did that and it stays here in  
6 Galveston, then what? Then what is -- then are we going  
7 to have a fight over which of your two schedules to put in  
8 place?

9 MR. HERMAN: I think if the case stays here in  
10 Galveston, there would then be -- I guess there still will  
11 be a dispute about which schedule should go forward, yes.

12 THE COURT: So, Mr. Alavi, isn't the first issue  
13 we should decide whether to stay here or go?

14 MR. ALAVI: I don't think so, Your Honor. If you  
15 decide to keep the case, for example, it's better for us  
16 to have the schedule in place now. We have had the  
17 scheduling conference.

18 If you decide to transfer the case, which I don't  
19 think you are going to do, all the parties are based in  
20 the Southern District of Texas --

21 THE COURT: By the way, it's amazing how  
22 confident both sides are on their positions on this issue.  
23 The greatest motion. It's the most ridiculous motion.  
24 I'm with you. I hear you.

25 MR. ALAVI: Well, I'm not using those -- I'm not

1 using pejoratives. I think, ultimately, when you decide  
2 it and you see that everyone is based in Houston, you are  
3 going to keep the case in the Southern District of Texas.  
4 But if you -- if you just play it out, if you deny the  
5 motion, it's better for us to have a schedule because we  
6 can proceed and not have to have another scheduling  
7 conference and have these dates in front of us.

8 If you transfer the case, the schedule goes away  
9 anyway; and Judge Albright enters a schedule. But the  
10 parties benefit from moving forward on certain aspects of  
11 the case while you are deciding the venue motion because  
12 that work will be beneficial wherever the case is. For  
13 example, an exchange of *Markman* terms and the *Markman*  
14 process.

15 With respect to the stay on discovery, we had this  
16 issue with Judge Eskridge in the Southern District  
17 recently in a case that we handled. It is entirely within  
18 your discretion how you handle discovery in these cases.  
19 There is -- there is no standard practice. It depends on  
20 the judge. And so we --

21 THE COURT: I understand.

22 MR. ALAVI: We argue as --

23 THE COURT: Mr. Herman, you -- I mean, I assume  
24 you want -- would you want to do discovery while the  
25 decision on whether to transfer the case is pending or are

1 you saying wait until the -- issue the decision and then  
2 conduct discovery?

3 MR. HERMAN: Your Honor --

4 10:00:06 MR. ALAVI: Our position on this -- to answer the  
5 question, Judge, our position on the discovery is that the  
6 discovery should be stayed until the *Markman*.

7 THE COURT: No. No. I'm with you. I'm with  
8 you. I was asking Mr. Herman.

9 10:00:17 MR. ALAVI: Oh, I'm sorry. I thought you were  
10 asking me. I apologize.

11 THE COURT: No. No.

12 12 MR. HERMAN: Your Honor, if the case is going to  
13 go forward in the Southern District of Houston, then we  
14 want to conduct discovery.

15 10:00:26 If the case is going to go forward in front of Judge  
16 Albright in Waco, then we're going to follow his schedule  
17 and the way he does things.

18 THE COURT: But let me re-ask this again. So  
19 let's say there is no decision for five weeks on --  
20 10:00:40 hypothetically, for five weeks or six weeks on the motion  
21 to transfer venue. Do you want to conduct discovery in  
22 those six weeks or are you willing to wait until Judge  
23 Brown issues a ruling on the venue and then you want to  
24 pursue discovery, understanding that Mr. Alavi's position  
25 10:00:56 is no discovery until the *Markman* hearing?

10:01:08

1 MR. HERMAN: Yeah. Under those circumstances,  
2 Your Honor, we would be willing to wait until the motion  
3 to dismiss or transfer has been heard -- has been decided.  
4 So we're okay with foregoing discovery until a decision is  
5 made whether the case is going to go forward in the  
6 Southern District or in the -- in Waco.

10:01:28

7 THE COURT: So let me ask this. At least for the  
8 time being, what if I do this. What if I set some --  
9 well, do you -- is there any reason not to set the first  
10 few deadlines here on the scheduling order? I mean, sort  
11 of the disclosure of asserted claims. You are going to  
12 have to do that no matter where you are, right?

10:01:47

13 MR. ALAVI: That's correct, Your Honor. And we  
14 don't have a disagreement on those dates, that I think the  
15 dates that are proposed by both sides simply follow the  
16 Court's schedule through --

10:02:04

17 THE COURT: Right. So here is what I'm thinking.  
18 Why don't I just do those dates? Because that goes  
19 through June. And then, if Judge Brown sends the case to  
20 Judge Albright, you are there.

10:02:17

21 If he doesn't, then I can just call a quick  
22 conference. You know, you guys confer and see if you can  
23 agree to a schedule and then we can just call a quick  
24 conference to set up sort of a revised schedule. Because  
25 it all, to me, sort of depends on when he has that -- when

1 he makes that decision.

2 MR. HERMAN: Your Honor, could I -- could I ask  
3 my colleague, Mr. Heard, to address that just because he  
4 was looking at the dates and is familiar with it?

10:02:30 5 THE COURT: Absolutely. Absolutely.

6 MR. HEARD: And, Your Honor, those dates are  
7 fine. As Mr. Alavi alluded to, we will have to do them in  
8 either jurisdiction, and we're prepared to move forward on  
9 them. So I think your proposal makes sense.

10:02:44 10 MR. ALAVI: Your Honor, I would ask Mr. Heard one  
11 question, if I may, which is I do think that the  
12 defendants had a request that some initial damage  
13 disclosures be delayed if discovery didn't commence  
14 immediately.

10:03:03 15 And so, Your Honor, I think that they may -- given  
16 that you are talking about perhaps staying discovery until  
17 the motion to transfer venue is decided, they may still  
18 want that particular deadline moved. And we told them  
19 that we would not oppose that because, of course, if they  
10:03:20 20 don't have discovery, they can't do those initial damage  
21 calculations.

22 THE COURT: Let's do this. I want to -- it's  
23 sort of -- I mean, it's unusual but, you know, it is a  
24 patent infringement case. So I am going to stay discovery  
10:03:34 25 until you get a ruling on the motion to transfer venue.

1 But I do want to put an order in place, at least with the  
2 dates you all have agreed on.

3           Would you just -- after this hearing, would you confer  
4 and then just shoot an e-mail to my case manager to let me  
10:03:46 5 know which dates -- I mean, it looks like the first four  
6 can be agreed to -- but to give you an opportunity to  
7 think about it or if you need to address it, you know, to  
8 make sure we are all on the same page.

9           MR. ALAVI: We can do that on the dates, Your  
10 Honor. May I get a clarification on the discovery stay?

11           THE COURT: Certainly.

12           MR. ALAVI: So the request that we had made was  
13 to stay non-*Markman* discovery because we may want to  
14 proceed with *Markman* discovery since you are going to  
10:04:11 15 enter dates that lead to *Markman*.

16           And then, the second piece is we did want to pursue  
17 and we talked to the DynaEnergetics lawyers about pursuing  
18 what is called system art discovery, which is prior art  
19 that's a system and not published --

20           THE COURT: Right.

21           MR. ALAVI: -- because we think it's relevant to  
22 the *Markman*. And so we would like to be able to pursue  
23 that through, at least the subpoena phase, to the system  
24 owners, primarily Schlumberger, to start that ball rolling  
10:04:40 25 because it will take a while for them to, you know, file

1 their objections, et cetera, et cetera.

2 THE COURT: I understand. Mr. Herman and  
3 Mr. Heard, you don't have an objection to that, do you?

4 MR. HERMAN: Your Honor, it seems like Mr. Alavi  
5 wants to have his cake and eat it, too. But for the  
6 interest of just getting through this initial scheduling  
7 conference, we can agree to it.

8 THE COURT: Okay.

9 MR. HERMAN: We want this case to proceed.

10 10:05:03 Right. We are the plaintiff. We want to get to trial  
11 faster.

12 12: THE COURT: I understand. You just -- you want  
13 it to proceed. You just want it to proceed before Judge  
14 Albright and not here. That's fine. There is no  
15 criticism there. That's obviously -- okay.

16 Well, then, do me a favor. Since you all are at least  
17 agreed on that, get together and make sure you have the  
18 dates. If there is something you want me to put in the  
19 order, I want to make sure I have the language clear that  
20 both parties have agreed to on what discovery can't go  
21 forward and can go forward, at least for the time being,  
22 and make it clear I'm not ruling on the ultimate issue of  
23 whether discovery is generally -- you know, should be  
24 stayed up till after the *Markman* hearing in general.  
25 10:05:38 That's -- we'll address both sides' views on that, if we

1 get to that point in the case.

2 MR. HERMAN: Thank you, Your Honor.

3 MR. ALAVI: Thank you, Your Honor. I have three  
4 questions for you, Your Honor. The first two are  
5 combined, which is what would you like us to do about the  
6 agreed discovery order, which lays out the scope of  
7 discovery, and the agreed --

8 THE COURT: So the agreed discovery order, you  
9 are agreed on it, right?

10 MR. ALAVI: That's the last I heard. I just want  
11 to make sure, given the -- your current ruling may have  
12 changed that, with respect to the parties. So I don't  
13 want to presume that we are still agreed because we  
14 anticipate it --

15 THE COURT: Let me say this. If you are agreed  
16 on it, I'm going to sign it. Okay. So I was about to  
17 sign it. I just wanted to have this conference. Do me a  
18 favor, given what we've just talked about, you get  
19 together. If you are agreeable on it, just let me know in  
20 the e-mail to Mr. Bostic; and I'll sign the agreed order.

21 With respect to the protective order, I will tell you  
22 exactly. My view is that I'm going to sign the protective  
23 order the way it's usually done in the Southern District  
24 of Texas and, at least for the time being, not include the  
25 prosecution bar. Just -- so that's what I'm going to do

1 on that, at least for the time being.

2 MR. ALAVI: And, Your Honor, that should -- if  
3 that becomes an issue, should we raise that through the  
4 letter brief process, the discovery issue?

10:06:56 5 THE COURT: Yes.

6 MR. ALAVI: Thank you, Your Honor.

7 THE COURT: Okay. Then if you don't mind, if you  
8 could, by the end of the day, hopefully, get back with  
9 Mr. Bostic because I do want to enter that schedule. But  
10 I greatly appreciate it. Sorry it took so long. You were  
11 at the end. But I'm glad we got it done and great to see  
12 all of you again. And Judge Brown and I look forward to  
13 working with you. Obviously, some of you want to work  
14 with us longer than others, and I fully understand that.  
15 We will see you and base it on the papers and argument.  
16 So best of luck. Thank you very much. You are excused.

17 ALL COUNSEL: Thank you, Your Honor.

18 THE COURT: And that concludes the initial  
19 scheduling conferences for Thursday the 11th of March,  
20 2021.

21 *(Proceedings concluded at 10:07 a.m.)*

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1      Date: April 23, 2021

2                   **COURT REPORTER'S CERTIFICATE**

3      *I, Laura Wells, certify that the foregoing is a*  
4      *correct transcript from the record of proceedings in the*  
5      *above-entitled matter.*

6                   \_\_\_\_\_*/s/ Laura Wells*\_\_\_\_\_

7                   *Laura Wells, CRR, RMR*

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